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No. 80-1577

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant.

v.

ALADDIN'S CASTLE, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Do children under the age of seventeen have an unconditional and unqualified constitutional right to play coin-operated amusement machines located in a commercial establishment?

2. Is the term "connection with criminal elements" unconstitutionally vague when such language is merely an "in house" directive to the Chief of Police to investigate an applicant's (applicant for a license to operate pinball machines) character and the Chief of Police has no power to issue or deny a license?

3. Are these issues justiciable at the instance of the owner of a commercial amusement enterprise who itself has received a license to operate coin-operated amusement machines?

LIST OF PARTIES

The parties are the same as in the caption.

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REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Northern District of Texas, William M. Taylor, Judge Presiding in Cause No. CA-3-77-0194-C entitled "Aladdin's Castle, Inc. V. City of Mesquite is found at 434 F. Supp. 473 (N.D. Tex. 1977).

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 77-2990 likewise entitled, is reported at 630 F. 2d 1029 (1980).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this issue as shown by the following:

1. The statutory provision believed to confer jurisdiction of this appeal in the Supreme Court of the United States is 28 U.S.C. Section 1254(2).

2. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and entered of record on November 17, 1980.

3. The Suggestion for Rehearing En Banc filed by Appellant (City) on November 28, 1980, was denied by Order entered December 15, 1981.

4. Appellant's Jurisdictional Statement was filed March 13, 1981.

5. The Supreme Court of the United States noted probable jurisdiction on May 18, 1981.

STATUTORY PROVISIONS CONSTRUED

The case involves construction of the Fourteenth Amendment to the United States Constitution and Ordinance No. 1353, Code of the City of Mesquite. Both provisions are reproduced in Appendix to Jurisdictional Statement and are not again reproduced.

ISSUES ARGUED

Issue: Whether there was a rational basis for the regulation prohibiting a business establishment from allowing minors under seventeen years of age to operate a coin-operated amusement machine unless accompanied by a parent or guardian.

Issue: Whether the City of Mesquite met the test of strict scrutiny in proving a state interest regulating

the age of persons allowed to play coin-operated amusement machines.

Issue: The proper standard of Judicial Review to be accorded a State (City) regulation of the business of a coin-operated amusement center.

Issue: Whether Aladdin's Castle, Inc. had standing to complain of a provision in a City Ordinance instructing the Chief of Police as to how to make an investigation of an applicant's character.

Issue: Whether the term, "connection with criminal elements" in an ordinance of the City of Mesquite is unconstitutionally vague in the context in which it is used to instruct the Chief of Police as to how he should make his investigation and report.

STATEMENT OF THE CASE

A. Procedural Background

This suit was brought by Aladdin's Castle, Inc. in the United States District Court for the Northern District of Texas for injunctive relief seeking to prohibit enforcement of a provision of City Ordinance 1353 limiting the operation of coin-operated amusement machines to persons seventeen and older and those under seventeen accompanied by a parent or guardian.

On the day of trial, Aladdin's filed a supplemental complaint seeking declaratory relief to the effect that a portion of Section 2 of said Ordinance requiring the Police Chief to make an investigation of an applicant's "character and conduct as a law abiding person" and requiring that he consider the applicant's "connections with criminal elements" as one of the matters relating to the character of the applicant be held unconstitutional for vagueness. (J.A. 111)

City questioned Aladdin's standing to raise the question of vagueness (J.A. 115) but was overruled by the trial court.

Upon trial the United States District Court upheld the age limit provision but held the "connections with criminal elements" provision void for vagueness. Both parties perfected appeal to the United States Court of Appeals for the Fifth Circuit which court reversed the trial court on the age limitation and affirmed that portion of the trial court judgment declaring the quoted language void for vagueness, holding that Aladdin's has standing in its own right and standing to invoke the rights of third parties, presumably its potential customers.[1]

B. Factual Background

In 1973 the City of Mesquite enacted Ordinance 1103 prohibiting persons under the age of seventeen from operating coin-operated amusement machines such as pinball machines unless accompanied by a parent or guardian. (J.A. 77) At that time Aladdin's Castle, Inc. was unknown to City (J.A. 67) and Bally Manufacturing Company had not purchased Aladdin's.

In 1975 representatives of Aladdin's requested that the City of Mesquite relax such ordinance in so far as Aladdin's, but not other operators, were concerned, representing to City that they, Aladdin's would provide high quality supervision of children in their establishment. (J.A. 29)

At Aladdin's urging, and in reliance upon Aladdin's representations that its customers would consist primarily of children whose parents were present in the mall area, although not physically within Aladdin's establishment

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[1]It is not clear from the opinion how the alleged vagueness of the statute affects the potential minor customers.

(J.A. 126), City granted Aladdin's request to allow such minors to play Aladdin's machines.

On February 7, 1977, the City Council being of the opinion that Aladdin's representations were false and/or misleading, City revoked the earlier relaxation of Ordinance 1310 and enacted Ordinance 1353 which reinstated the 1973 age limitation. Throughout the entire period from enactment of the Ordinance in 1973 to enactment of Ordinance 1353 in February of 1977, the age limitation was in effect AT ALL TIMES FOR ALL OPERATING ESTABLISHMENTS except that on February 5th and 6th, 1977, Aladdin's operated under Ordinance No. 1310 AFTER City had posted notice to enact ordinance 1353. (J.A. 44) All other establishments in the City have operated pursuant to the age limitation from 1973 to date as have establishments in other cities including the City of Dallas (J.A. 135) and the City of Garland (J.A. 25). No evidence was offered in the trial court that any establishment in any of these cities were operating unprofitably, including Aladdin's store at Valley Mills, (J.A. 129)[2].

City's police authorities had determined a need for the age limitation due to problems of drugs, truancy and other problems (J.A. 130-152) although not necessarily at Aladdin's. (At time of trial, Aladdin's had only operated in Mesquite for four months. Sgt. Drew had information but not confirmation, of drug trade in Aladdin's) (J.A. 152).

In the trial court, Aladdin's had stipulated that the proper review was upon the "Rational Basis Test" and that Aladdin's had the burden of proof. (Pl. Brief in Support of Verified Complaint-R 43 at 67). The City

[2]The statement of the court below that City knew the change would clearly make the Mesquite operation unprofitable and force it to close is not supported by the record.

offered a minimum of evidence consisting of the testimony of three police officers of the City and one City of Dallas police officer, (J.A. 130-152) and testimony as to the City of Dallas age limitation (J.A. 135). A copy of the City of Garland Ordinance is in the record (J.A. 25). City did not attempt to show the hundreds of police incidents in other cities or bring in the multitude of witnesses that it could have had the case been tried under the strict scrutiny test.

The question of "association" was raised for the first time in the United States Court of Appeals for the Fifth Circuit; that Court being of the opinion that such association gave rise to a constitutionally protected right. The evidence of association is not in the record and it is not clear from the opinion how the Court below determined that any "association" other than mere concurrent presence existed. While it can be assumed that some of the players may converse during or between plays, there is no evidence that such conversation would be any different from that occurring in any other commercial transaction such as visiting a physician or dentist or purchasing a handgun at a pawn shop.

The record is devoid of any evidence of "association" in the constitutional sense.

SUMMARY OF THE ARGUMENT

The first three issues relate to the regulation of minors playing coin-operated amusement machines in a commercial establishment and the proper scope of judicial review to be accorded such regulation and are subsidiary questions to the first question presented in the jurisdictional statement.

The fourth issue relates to the third question presented in the jurisdictional statement and the fifth issue relates to the second question presented in the jurisdictional statement.

Argument under the first three issues demonstrates that the City met such burden of proof as is required for the type of regulation involved; that under the "rational basis" test City is entitled to a presumption of validity of its enactment and the burden of proof was on Aladdin's Castle, Inc. to prove a lack of harm, evidence of which is totally lacking. *Vance v. Bradley,* U.S. , 99 S.Ct. 939 (1979); *Schilb v. Kuebel,* 404 U.S. 357 at 364, (1971); *Ginsberg v. New York,* 390 U.S. 629, (1968); *Williamson v. Lee Optical Co.,* 348 U.S. 483, (1955); *McGowan v. Maryland,* 366 U.S. 420, 393, (1961); *Tigner v. Texas,* 310 U.S. 141, (1940); *Goldblatt v. Hempstead,* 369 U.S. 590, 569, (1962).

City demonstrates that this Court has traditionally indulged a deference for the determinations of legislative bodies and that it has not required legislation to cure all ills at one time. *Railway Express Agency v. New York,* 336 U.S. 106, (1949); *A. F. of L. v. American Sash Co.,* 335 U.S. 538, (1948).

Further, testimony of harm based upon unarticulated community values is not contrary to the rule in *Ginsberg v. New York,* Supra and *Village of Belle Terre v. Boraas,* 416 U.S. 1 at 9, (1974), quote:

> "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where *family values, youth values* and the blessings of quiet seclusion and clean air make an area a sanctuary for people." (emphasis added)

Finally, City would show that *Murphy v. California,* 225 U.S. 623, (1912), relied upon by the trial court is, contrary to the opinion of the Court below, good law today with respect to determinations by a state that an activity in its actual setting and *not in the abstract* is harmful and that *Murphy,* Supra was cited with approval as recently as 1973 in *Paris Adult Theater I v. Slaton,* 413 U.S. 49, (1973) N. 15.

City submits that if the test of "strict scrutiny" is applied its burden is far greater than under the "rational basis" test. Nevertheless, the Court below failed to take into consideration the distinction between the rights traditionally accorded children and adults and misconstrued the holding in *Bellotti v. Baird,* 443 U.S. 622, (1979), as authority that the standard for minors and adults is the same under all circumstances.

Even in fundamental rights cases, the impact upon the individual is given some consideration.

The impact upon a minor of being denied the right to play a pinball machine or view "girlie magazines", *Ginsberg,* Supra, are but trivial compared to the right to decide whether or not to bear a child with the lasting effect of such decision extending far past majority, or even the right to an education, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, with all the association inherent in the public schools. Therefore, as in *Ginsberg,* Supra, where First Amendment rights were involved, the same standard is not in all cases applied to adults and children and the proof offered by City is equal to that of the State of New York in *Ginsberg,* Supra.

City submits, however, that the Court applied the incorrect standard of review because the right of association is not involved in this case other than such as might be purely incidental to any business transaction; that the broad scope

given the term "association" would encompass virtually every business transaction known from a visit to the dentist to a call by a plumber to repair a leaking faucet.

Nor are the factors present to make it "suspect" legislation. A basic distinction exists between a group comprised of children of a politically dominant group and groups composed of minority race, color or religion; to wit: the natural love and affection borne by parents for children will afford protection for that group not available to traditional "suspect" groups. *Wisconsin v. Yoder,* 406 U.S. 205 (1972)

While it is clear that the Court below thought little of the wisdom of the challenged regulation, where the suspect criteria is absent the courts do not sit in judgment as to the wisdom of legislation. *James v. Strange,* 407 U.S. 128 at 134, (1972)

> "We do not inquire whether this statute is wise or desirable or whether it is based on assumptions scientifically sustantiated, *Roth v. United States,* 354 U.S. 476, 501, 77 S.Ct. 1304, 1317, 1 L.Ed. 1498 (1957) (Separate opinion of Harlan, J.) misguided laws may nonetheless be constitutional."

Nor is it practical for the Courts to judge the wisdom of the multitude of State and local enactments.

Both the legal precedents of this Court and practicality militates against extending the more stringent review of strict scrutiny to cases of this nature.

The decision of the Court below as to Aladdin's standing to raise the question of vagueness is predicated upon an incorrect construction of the ordinance; reasoning that the instruction to the Chief of Police to consider an applicant's "connection with criminal elements" established a standard

by which the applicant would have to conduct itself. Such is not the case at all.

Regardless of how the instruction is communicated to the Chief, the applicant will be granted or denied a license upon the basis of "good character as a law abiding citizen".

The instruction to the Police Chief requires an intelligence gathering task exactly as reviewed by the Court in *Laird v. Tatum*, 408 U.S. 1, (1972).

As required in *Ex Parte Levitt*, 302 U.S. 633, 34, (1937), Aladdin's failed to show it "has sustained or is immediately in danger of sustaining a direct injury . . . ."

Any evidence offered as a result of the investigation would not be in the terms of the direction to the Chief of Police but would be in its actual context.

Nor is the challenged language unconstitutionally vague in the context in which it is used.

The Court below applied criminal case standards to business regulation. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, (1952), and failed to give effect to the legislative policy designed to prevent the control of amusement machines by organized crime.

Thus, the Court below erred in finding standing of Aladdin's Castle, Inc. to raise the question of vagueness and in holding the challenged language unconstitutionally vague in the context in which it was used.

ARGUMENT AND AUTHORITIES

The paramount question presented by this appeal is the proper standard of judicial review to be accorded the provision of the challenged ordinance regulating the playing of coin-operated amusement machines by minors. The Court

below held that minors possess an unconditional and unqualified constitutional right to play coin-operated amusement machines located in a commercial establishment and applied the strict scrutiny test.

The case was tried and decided by the trial court upon the traditional "rational basis" test.

No question of "strict scrutiny" or "compelling state interest" was raised in the trial court and the evidence was not offered to meet the more exacting "compelling state interest" test.

Even the trial court, however, confused the burden of proof requirement, characterizing the evidence offered by City as "slender reeds" indicating his understanding that the burden was on the City to go forward with the evidence contrary to A.C.I.'s acknowledgment of such burden. Obviously, the Plaintiff and movant having accepted the burden of proof and stipulated that the case was controlled by the "rational basis" test[3], City offered only a minimum amount of evidence.

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[3]See Plaintiff's Brief in Support of Verified Complaint for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction, (R 43 at 67)

> "The 'compelling state interest' test which places the burden of strict scrutiny upon the state to justify legislative classification based upon suspect criteria (race, national origin, lineage and alienage) or fundamental interests (e.g., right to travel, residency requirements, right to vote and right to procreate) *is not involved in this litigation.* What *is* involved is the 'rational relationship' test which requires A.C.I. to prove that the classification created by Mesquite is without any reasonable basis and hence, purely arbitrary." (Emphasis Added)

RATIONAL BASIS

If the "rational basis" test was the proper form of review it was not encumbent upon City to offer any testimony and City could have relied upon the legal presumption traditionally accorded legislative acts. *Vance v. Bradley,* U.S. , 99 S.Ct. 939 (1979); *Schilb v. Kuebel,* 404 U.S. 357 at 364, (1971); *Ginsberg v. New York,* 390 U.S. 629, (1968); *Williamson v. Lee Optical Co.,* 348 U.S. 483, (1955); *McGowan v. Maryland,* 366 U.S. 420, (1961); *Tigner v. Texas,* 310 U.S. 141, (1940).

In *Schilb v. Kuebel,* Supra, this court stated, 404 U.S. at 370,

> "The record is silent but the flow indeed may be the *other way.*" (Emphasis Added).

In *McGowan v. Maryland,* Supra, the court said, 366 U.S. at 426,

> "The record is barren of any indication that this apparently reasonable basis does not exist . . . "

and, 366 U.S. at 425,

> "State Legislatures are presumed to have acted within their constitutional powers . . . "

The court answered this question in *Ginsberg v. New York,* 390 U.S. 629 at 642,

> "While these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either."

Therefore, under the decision of this court, if the record be "barren" or "silent" or "no causal link has been demonstrated", nevertheless, the State is "presumed to have acted

within its constitutional power". See *Goldblatt v. Hempstead,* 369 U.S. 590, 596, (1962),

> "Our past cases leave no doubt that appellants had the burden on 'reasonableness'. e.g., *Bibb v. Navajo Freight Lines,* 359 U.S. 520, 529, (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland,* 346 U.S. 545, 553, (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.,* 304 U.S. 144, 154, (1938) (exercise of police power will be upheld if any state of facts either know or which could be reasonably assumed affords support for it)."

See also *Vance v. Bradley,* Supra, 99 S.Ct. 950,

> "In an equal protection case of this type, however, *those challenging* the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."

Notwithstanding the foregoing traditional rule of law and a stipulation by A.C.I. that it had the burden of proof, the City, nevertheless, offered testimony from four highly qualified witnesses (J.A. 130-152) to the effect that these amusement centers created numerous incidents of truancy, illegal drugs and other problems. City submits that the proffered testimony is more than adequate to support a "rational basis" and is not "slender reeds", but in fact is ample to support the "compelling state interest" requirement if it should be determined that scope of review is properly applied. City submits, however, that if it is determined that the "compelling state interest" test should be applied, considering that the case was not tried on such

basis, the proper course would be to remand for a fuller development of the evidence under that scope of review.

If, however, the proper standard is the rational basis as it has been since this court decided *Tigner v. Texas*, Supra, in 1940, overruling *Connolly v. Union Sewer Pipe Company*, 184 U.S. 540, then the presumption given legislative enactments should be adequate absent evidence.

Obviously, the harm believed to result from the prohibited activity is not something that can be proven in the same manner as a broken bone in a personal injury case. The proof, of a necessity, must depend upon certain interpretations involving the experience of those in police work; of community values interpreted by the elected representatives and more than anything, a working knowledge of children.

This court has traditionally indulged a deference for the determinations of legislative bodies. In *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. at 563; this court stated,

> "We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience . . . might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve."

Certainly, the Louisiana legislature could not prove to a certainty that relatives of river pilots would be more qualified than non-relatives any more than the State of Maryland could prove that the selling of certain articles on Sunday would be harmful.

This court quotes Chief Justice Waite from *Munn v. State of Illinois*, 94 U.S. 113, in *Williamson v. Lee Optical*, Supra,

> "For protection against abuses by legislatures, the people must resort to the polls, not the courts."

The Court further states in *Williamson v. Lee Optical*, Supra, 34 U.S. at 488,

> "The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought."

It is clear that the court below departed from the principles applied by this court and placed the burden of proof on City. See under heading "Rational Basis" 630 F. 2nd at 1039,

> "The record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person who would promote gambling, the sale of narcotics and other unlawful activities. . . ."

And

> "Initially, therefore, we note that the City failed to demonstrate the need which would give rise to an interest in protecting its young citizens from corrupt influences in amusement centers."

and, same page,

> "If such people do go to the centers, there is *no evidence* that they are drawn by the machines . . . the City did not *show* that barring children from these centers would in any way stop these people from associating with children." (emphasis added)

Even though the court below purported to consider the questions separately under the "rational basis" test, throughout the opinion the court applied the "strict scrutiny" test and denied the City any presumption of validity as well as misreading the evidence.

Under the rules of law laid down by this court, it is not necessary that all ills be cured at the same time, *Williamson v. Lee Optical,* Supra; *Railway Express Agency v. New York,* 336 U.S. 106, (1949); *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, (1934) and the legislative body may exempt or defer one phase while regulating others. *A. F. of L. v. American Sash Co.,* 335 U.S. 538, (1948). The court below required, however, that the regulation cure all ills and cover all phases of the problem or fall.

It is therefore clear that if the test is the "rational basis" as held by the trial court, the regulation is within the Constitutional limits set forth by this court because, as stated in *Ginsberg v. New York,* 390 U.S. at 642,

> "While these studies all agree that a casual link has not been demonstrated, they are equally agreed that a casual link has not been disproved either."

If then, City failed to prove a causal link between the operation of pinball machines and truancy and other ills recited by witnesses, certainly the evidence offered by A.C.I. has not disproved such idea.

The concept that playing pinball games by minors is harmful is exactly on par with the concept that looking at "girlie magazines" by minors is harmful determined by the New York legislature and upheld by this court in *Ginsberg,* Supra.

Had this court placed the burden of proof on the State of New York in *Ginsberg,* Supra, as did the court below

in the instant case the State of New York would have been in the same position as is the City of Mesquite because the ills associated with either are not so open and obvious as other ills but must depend, to some extent upon unarticulated community values. Both Mesquite and New York, while not willing to go to the extent of Sparta, does desire to develop ideal citizens. If a minor must forego playing a few games or looking at girlie magazines in order that he develop into a good citizen, this is hardly a deprivation on par with the treatment accorded the youth of ancient Sparta.

Conceded, neither the prohibition of girlie magazine nor pinball games will, standing alone, develop good citizens. But as this court has held, *Williamson v. Lee Optical*, Supra; *Railway Express Company v. New York*, Supra; *Semler v. Oregon Board of Dental Examiners*, Supra; the legislative body is not required to cure all ills at one time. The City and State has other legislation, (compulsory school attendance, alcohol consumption age limits and a host of other laws), dealing with minors and it should not be expected that one ordinance is to cure all ills associated with minors. Nor will all of the laws on the books of all the states cure all problems associated with minors. But they may be one step in the right direction, *Railway Express Agency v. New York*, Supra. At the very worst, such laws can cause little harm to the minors (as opposed to A.C.I.) for throughout recorded history children were not able to play pinball machines except during the last century because they were unavailable. No severe trauma appears to have been inflicted by such lack prior to the invention of such games.

The rationale that protection in one area is unconstitutional because the regulation fails to afford protection in another area is self-defeating and likened to an argument that the prohibition of handguns on the person is uncon-

stitutional because a malefactor might harm a citizen with a knife or club.

But what of the application of community values as a basis for statutes? At least half of our regulations are influenced, to some degree, by imprecise community values. Commercial prositution and social extra-marital sex both carry the potential for the same physical harm. It is only in the community value area that commercial sex is deemed more harmful than social union.

This court, in upholding the application of community values as a basis for legislation in *Village of Belle Terre v. Boraas*, 416 U.S. 1 at 9, (1974), said,

> "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where *family values, youth values* and the blessings of quiet seclusion and clean air make an area a sanctuary for people." (emphasis added)

Although additional traffic was mentioned, it is doubtful if it could be proven that six persons unrelated by blood or marriage would create more traffic than the same number of people having some blood or marital relationship.

Pure and simple, the case involved six male and female students living in one house unrelated by blood or marriage and such action did not comport with the community values of the *Village of Belle Terre*. As stated by Justice Marshall, 416 U.S. at 17, (dissenting opinion),

> "The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents."

What were the "youth values", the protection of which the individuals with different lifestyles had to be "fenced out"? City submits that those values were not such that

they were capable of precise proof. No one contended that having the multiple unit of unmarried individuals would make the youth of the community physically ill or unsafe.

The ills that would adversely affect youth values were those understood but unarticulated in *Ginsberg v. New York*, Supra, and in the instant case more appropriately called "moral values", no different than the values sought to be protected by laws prohibiting gambling, prostitution, pornography, statutory rape and selling on Sunday.

Legislation prohibiting some of the above prohibited acts is justified on the basis of other factors such as Sunday sales in *McGowan v. Maryland*, Supra, but the desire to protect moral values is present and everyone knows it. Contrary to what the court below may believe, legislators do not legislate in a "morally neutral" vacuum and never will and this court has never required such. The concept of right, decency and honor is too deeply rooted in our traditions to ignore.

City agrees with the court below that recreation or idleness, per se, is not harmful. The City provides parks and other means of recreation and encourages its citizens to partake of the benefits thereof. The playing of a pinball machine or a game of billiards when viewed in the abstract, is not harmful. Unfortunately, these games are not played in the abstract.

Idleness, like food, is neither all good nor all bad. The idea of having food is good because without it one would starve. This does not mean, however, that no food is harmful. More people in this country suffer from eating than from starvation.

Idleness is likewise good in the abstract. Without some idle time to refresh our minds and bodies, we would wear out. But as with food, not all idleness is helpful. Children

that are taught to act in a responsible manner by being assigned duties at home, required to attend school at the designated times and use their money for useful purposes, all other things being equal, grow into more responsible citizens than those that are encouraged to forego responsibility for idleness.

At the time *Murphy v. California,* 225 U.S. 623, (1912), was decided the benefits of idleness, in the abstract, was not unknown.

The members of the *Murphy* court knew that rest and relaxation was needful equally as well as those deciding *Papachristou v. City of Jacksonville,* 405 U.S. 156, (1972). They likewise knew that the participation in certain games such as baseball, football and other sports provided needed exercise, furthered a feeling of teamwork and sportsmanship and improved the quality of life. Men and women of the *Murphy* era as well as of the present, attended the theater, visited art galleries and performed many acts that produced no income and provided no food or shelter.

Any suggestion that the *Murphy* court considered all non-productive activity harmful is misleading and incorrect.

Nor did *Papachristou,* Supra, hold that all idleness was good.

At the same term in which *Papachristou,* Supra, was decided this court decided *Wisconsin v. Yoder,* stating, 406 U.S. 205 at 228,

> ". . . but as alternative to the equally *undesirable consequence* of unhealthful child labor displacing adult workers, or on the other hand, forced *idleness* . . . ." (Emphasis Added)

The exact words relied upon by the court below are as follows; 630 F.2d at 1041, n. 16,

> "All loitering, loafing, or idling . . . is not *necessarily* detrimental to the public welfare . . . it may be and often is entirely innocuous." (Emphasis added)

Nothing in the foregoing is contrary to the decision in *Murphy v. California,* Supra, nor the position of City herein. The *Murphy* Court was speaking on the law of nuisance which traditionally has allowed works of necessity or productive work more leeway than non-productive or frivolous activity, e.g. a citizen making noise repairing his home after a storm versus making the same amount of noise for purposes of amusement or the noise from a truck delivering needed food versus a group of motorcyclists riding for pleasure. See *King v. Columbian Carbon Co.,* 152 F. 2d 636, 641 (5th Cir. 1946)

> "As a concession to industrial progress and social utility the law will not abate a *useful* and lawful enterprise even though it be a nuisance. . . ." (emphasis added)

With or without that comment with regard to idleness, *Murphy v. California,* Supra, is the only expression by this court addressed to the question at hand and involved a review of the prohibition of a particular type of activity by the State in the actual setting and context of pool halls as they existed; not in the abstract, and a finding that prohibition of that particular activity or idleness was within the power of the State. The court judicially knows that at least as much "association" occurs in a pool hall as in a pinball establishment.

Rather than *Murphy v. California* being weakened by more recent decisions of this court, City submits that the holding is strengthened by the more recent cases of *Ginsberg v. New York,* Supra, *McGowan v. Maryland,* Supra

and *Village of Belle Terre v. Boraas,* Supra. City submits that to the extent *Murphy v. California* holds that a state may examine a particular activity and determine that in the actual setting and context in which it exists such activity may be proscribed or regulated, that such holding has never been overruled or weakened and that it is the law today. See *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, (1973), n. 15.

The City fathers, with the advice of their police department that must deal with errant youth and are charged with protection of all youth, has viewed the situation in its actual setting. They are better able to judge than the judiciary the effect the activity in its real life setting will have upon youth values; upon their efforts to protect youth from the numerous factors within and without the individual that detract from the youth values and community values believed important in the proper development of our citizenry. The fact that they are unable to articulate these values in a precise manner in no wise detracts from their existence. Most people could not give a precise definition of "liberty" but believe it important.

The deference given by this court to determination of elected representatives of the people is not outdated doctrine or a chance phrase picked up from an old case and carried forward after the reason for it has ceased to exist. It is founded upon sound policy and is the cornerstone of our doctrine of separation of powers.

See *Shaprio v. Thompson,* 394 U.S. at 655, (1969), denying any role of a "Super-legislature" and *Village of Belle Terre v. Boraas,* Supra, as to a "zoning Board of Appeals".

Thus, the courts should exercise restraint in extending their supervisory role over lawmaking into those areas not heretofore considered "suspect legislation", i.e., race,

sex, national origin or truly fundamental areas such as speech, religion and other rights vital to our way of life.

If this deference to the determination of facts and circumstances regarding community values by the elected representatives of the City of Mesquite as was given to the Village of Belle Berre and to the New York Legislature in *Ginsberg V. New York,* Supra, is indulged and the burden of proof is placed on the party challenging the legislation; the presumption, standing alone or the evidence standing alone and certainly both taken together, will support a rational basis for the challenged regulation.

STRICT SCRUTINY TEST

If the proper scope of judicial review to be applied is the "strict scrutiny test" then City concedes that it has a much heavier burden, although not necessarily an insurmountable one, because of the different status of children in our society. It is not so much that different legal standards apply to children but that children are in *fact* different from adults. The regulation in *Ginsberg,* Supra, involved a "fundamental right", e.g. speech, not within the ambit of obscenity as defined by this court, and was no more narrowly drawn than the instant ordinance. (The statute in *Ginsberg* absolutely prohibited sale to minors whereas the instant ordinances permits playing when accompanied by a parent.)

The court below cites *Bellotti v. Baird,* 443 U.S. 622, (1979), as authority that the standard is not reduced because minors are involved. City submits that the court below has misconstrued this court's pronouncement as to regulation of minors.

While clearly children are not *denied protection under the constitution* due to their minority, there are simply some rights possessed by adults that have not been ex-

tended to children. *Bellotti v. Baird,* 443 U.S. at , 99 S.Ct. at 3045 states,

> "The guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."

To hold that regulation of the activities of all children at all ages is on par with the regulation of the activities of adults is to ignore plain facts of life. Each and every day children are denied rights routinely enjoyed by adults. See *Parham v. J.R.,* — U.S. —, 99 S.Ct. 2473 (1979) at 99 S.Ct. 2515,

> "Under our law, parents make decisions for their minor children that deprive the children of liberty and even life itself."

No one would give serious consideration to a law allowing one adult to require another adult to "eat your spinach", "wash your hands", "go to church", or any of the one thousand and one commands given to children as part of their daily upbringing. The fact that in the instant case parents act through their elected officials to control the activities of their children imposes no greater *restraint* upon the right of a minor to do as he pleases than if the parent acted directly. In *Bellotti v. Baird,* Supra, the court was considering restraint by parents through the state.

Recognizing that this court has held, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, that the importance of an activity to the individual does not determine whether or not the right is "fundamental", it is clear that the importance of the right to the individual was at least one factor in *Bellotti v. Baird,*

> ". . . . there are few situations in which denying a minor the right to make an important decision will have *consequences so grave and indelible*" (emphasis added)

and, same page

> *"For these reasons* . . . the State may not impose a blanket provision . . . ; (emphasis added)

If the "important decision" in *Bellotti* were not made prior to majority the woman would be stuck with responsibility that would not end with her majority but would last far into adulthood.

In the case of marriage, voting or playing pinball, one need only defer the activity to the age of majority, much as one who happens not to like spinach.

Nor does the regulation discriminate against any person because we all served our apprenticeship under the authority of adults and everyone has an equal chance to reach the age of majority without the lasting burden sought to be imposed in *Bellotti v. Baird,* Supra. In this important distinction, the court below erred and the evidence supports the regulation whether the right to play pinball is "fundamental" or otherwise because of the distinction between regulation of the activities of minors and that of adults and the relatively minor impact upon the individual.

SCOPE OF REVIEW

The court below incorrectly applied the constitutionally protected "right of association" in this case. Right of association is not involved to any extent.

There is no evidence or suggestion in the record that minors visit the establishments for reasons other than

to play the machines. Any *harmful* association suggested by the testimony consists of *unwanted* association by those adult persons who would victimize the young. It is not suggested that young people play the games as members of a team or engage in tournaments as in the case of outdoor sports (baseball, football, etc.) or bowling. Primarily, the games are played solo. Although individual players may ocassionally converse with each other between or during plays, the overriding purpose for visiting the establishment is the rental of a machine for a cash consideration variously estimated at between five and nine dollars per hour. The playing requires a high degree of concentration and at least in A.C.I.'s case, the customers are not allowed to do much socializing between games and cannot even drink a coke or "loiter". (J.A. 126) More social contact exists in numerous other commercial activities such as the gas lines of recent, standing in line at a bank-teller cage or a visit from the plumber to repair a faucet.

Constitutionally protected "association" means something more than mere concurrent physical presence purely incidental to a commercial transaction for, except for hermits, almost every activity known involves some interchange between human beings. The fallacy in raising an activity to constitutionally protected "fundamental" status every time two or more people are present or engage in casual interchange is that the government would be relatively powerless to govern.

When two or more people engage in a dice game, in a drag race or an act of prostitution; when a vendor sells merchandise, when a con artist bilks a victim; all of these activities would attain protected status if the term "association" is given its broadest scope.

City submits that the term "association" in the constitutional sense, means, at the minimum, some desire or intent to mingle or engage in interchange with others.

If two or more people rent a motel room, an automobile or a boat the rental transaction itself should be governed by the same law that governs the transaction when the rental is by one person.

Once minors have rented the machine lawfully (accompanied by a parent or guardian) and once it is shown that they desire to associate while engaging in lawful activity; *at that point* the "association" becomes a fundamental right. Likewise, when adults enter into a dice game their "association" e.g., conversation and social activity, is protected but not *their participation in the dice game* where such is illegal.

No one would seriously contend that the rental of a hotel room for purposes of prostitution is constitutionally protected because prostitution requires participation of more than one person.

Under the broad interpretation given the term "association" by the court below the photographing of children in sex scenes one at a time could be prohibited upon the showing of a rational basis but if photographed in groups of two or more a more stringent test must be applied. Such a rule is itself irrational.

Had such a rule been applied in *Ginsberg*, Supra, the court could have reasoned that minors purchasing the magazines would share them with their friends and read "association" into the activity. The State having failed to prove a causal link between the magazines and harm and the right to share these books with their friends being fundamental, this court would have been compelled to void the New York statute.

It cannot be doubted that the six college students in *Village of Belle Terre v. Boraas*, Supra, "associated" in the broad sense of the term and likely more than the players of

amusement machines. Nevertheless, this court considered and rejected any "right of association" in upholding that City's ordinance.

This court judicially knows that there is much more associational activity in the public schools than playing pinball machines and yet found that the right to attend public school is not a fundamental right. *San Antonio Independent School District v. Rodriguez,* Supra.

To hold that viewing non-obscene magazines, (as applied to adults) residing in a home or attending public school, with the associational activity inherent therein, is not fundamental but that playing amusement machines is fundamental is, to say the least, startling.

Nor is the classification based upon "suspect" criteria. *Kahn v. Shevin,* 416 U.S. 351, (1974); *Shapiro v. Thompson,* 394 U.S. 618, (J. Harlan, dissent. op.). (See also n.1, Appellant's Brief citing Appellee's Brief).

There is one great and distinct difference in the group classified in the instant case and those consisting of groups of a particular race, color, national origin or other suspect groups.

The natural love borne by members of the politically dominant group for their children, members of the politically impotent group, will provide more protection for that group than all the courts and all the rules of law in the land. The feeling of responsibility and protection for one's children is one of the more basic attributes of man and makes unnecessary any suspicion that the dominant group will sacrifice the interests of the politically impotent group as in the case of those of different race, color or national origin. *See Parham v. J.R.,* 99 S.Ct. 2504,

> "more important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."

Every person of voting age comprising the dominant group was at one time a member of the politically impotent group and can be expected to understand the needs of such group. See *Wisconsin v. Yoder,* Supra.

This leaves then, only the question of the wisdom or value of the ordinance.

This court states in *Dandridge v. Williams,* 397 U.S. 471 at 487,

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this court**** but the Constitution does not empower this court to second-guess state officials**** "

City recognizes that there is divided opinion as to whether such regulation should be exercised. Many cities do not so regulate this activity and likewise many do have the same or similar regulations.

See also, *James V. Strange,* 407 U.S. 128 at 134, (1972),

> "We do not inquire whether this statute is wise or desirable or whether it is based on assumptions scientifically substantiated, *Roth v. United States,* 354 U.S.

> 476, 501, 77 S.Ct. 1304, 1317, 1 L.Ed. 1498 (1957) (Separate opinion of Harlan, J.) misguided laws may nonetheless be constitutional."

and, same p.

> "Our task, however, is not to weigh this statute's effectiveness but its constitutionality."

This court expressed the concept in *Dandridge v. Williams,* Supra, 397 U.S. at 485, (1970), as follows:

> "And it is a standard that is true to the principal that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

See also, *San Antonio Independent School District v. Rodriguez,* Supra, 411 U.S. at 33,

> "It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."

Thus, whether the courts deem the instant ordinance wise or unwise, so long as reasonable minds may differ upon the question, and obviously they do, it is a basic tenet of federalism that the courts do no substitute their opinion for that of the legislative body except in those extreme cases where animosity and prejudice due to race or similar factors call into question the objectivity of the lawmakers or those cases involving truly fundamental rights such as speech, religion, voting and the right to travel. This rule is firmly established by this court and should control the instant case. See *Vance v. Bradley,* 99 S.Ct. 939 at 946, quoting *Fireman v. Chicago, R.I. & P. R. Co.* 393 U.S. 129, 138, 89 S.Ct. 323, 28, 21 L.Ed. 2d 289 (1968),

> ". . . and this kind of policy, under our constitutional system, ordinarily is to be fixed only by the people acting through their elected representatives".

But aside from the legal and precedential basis for such holding, City submits that it is mandated by a practical basis.

As stated by Justice Harlan in his dissenting opinion in *Shapiro v. Thompson,* 394 U.S. at 655,

> "Virtually every state statute affects important rights."

Those that do not affect "important" rights affect lesser rights. If the courts take on the responsibility of determining, de novo, the wisdom of the multitude of State and local statutes and ordinances the courts will need to become experts in every field of human life and endeavor. The time required to accomplish this task would be without limit. This, in turn, would detract from the courts' primary role of deciding questions of law. Nor, does City believe, that the judiciary is in a position to acquire the expertise necessary for such a monumental task.

This court stated in *San Antonio Independent School District v. Rodriguez,* Supra, 411 U.S. at 42,

> "In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this court's lack of knowledge and experience counsels against premature interference with the informed judgments made at the local levels."

No doubt, if review as to wisdom of legislation is extended to all of the action of State and local bodies such as in the

instant case there will be many other areas wherein the courts will express similar misgivings.

Therefore, the precedents of this court and practicality militates against extending the more stringent review of strict scrutiny to cases of this nature.

STANDING

The court below erred in its interpretation of the provision of the challenged ordinance relating to "connections with criminal elements," (J.A. 84) deeming such provision to be proscriptive. Such is not the case at all.

The ordinance (J.A. 82-3) reads, in part,

> "Any person desiring to obtain a license for a coin-operated establishment shall apply to the City Secretary by original and five (5) copies; one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner for review.
>
> The Chief of Police shall make his *recommendation* based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude *and connections with criminal elements*, taking into consideration the attraction by such establishment of those of tender years." (emphasis added)

The definitions considered by the court below are reproduced at (J.A. 86-7) but are not a basis of the court below's decision.

The decision of the court below as to standing was predicated upon the mistaken belief that a finding of some "connection with criminal elements" would automatically

bar an applicant from obtaining a license. There is no such provision in the ordinance.

The import of the quoted provision is a *directive to the Chief of Police* as to *what matters he is to investigate.* There is no prohibition in the ordinance as to the granting of a license to a person having "connections with criminal elements".

Upon approval by all parties the City Secretary is required to issue the license. If, on the other hand, one or more parties fail to approve the application, the matter is referred to the City Manager for decision, (J.A. 84),

> ". . . he shall review such application, together with such recommendation as may be furnished and shall *approve* such application or *disapprove* same. . . ."

and, (J.A. 85),

> "Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305 V.A.C.S. to show to the council that he or it is *of good character as a law abiding citizen* to such extent that a license should be issued. Upon hearing, the council may reverse the decision of the City Manager in whole or in part or may affirm such decision."

Nowhere will it be found in the ordinance that "connection with criminal elements" is a bar to a license or that the Chief of Police may deny a license. His duty, under the ordinance, is to make an investigation and a report of such investigation to the City Manager. (Note that A.C.I. has not alleged an invasion of privacy but only vagueness.)

Regardless of the content of the Chief's report, the standard for council review is "good character as a law abiding citizen."

Review is then provided to the State District Court, who, of course, would be bound by the standa. l employed by the City Council, not the standard employed by the Police Chief. The district court can then review the evidence as to "good character as a law abiding citizen" without giving consideration to any "connection with criminal elements" as was actually done by the Texas Supreme Court in *The City of Mesquite v. Aladdin's Castle,* 570 S.W. 2d 377 (Tex. 1978),

> "The denial of the license was not reasonably supported by substantial evidence. We do not reach the question of the constitutionality of the ordinance."

Thus, Aladdin's Castle, Inc. was not required to take any action or refrain from taking any action by reason of the challenged language. Only the Chief of Police was required to act and he does not contend that he does not understand the language.

Further, at the time of trial A.C.I. had been issued a license and had no application pending. There was no showing that they would be adversely affected by the language, particularly considering that the State Court had mandated the issuance of a license.

Therefore, Respondent's only complaint is about an intelligence gathering requirement of the Chief of Police exactly as that complained of in *Laird v. Tatum,* 408 U.S. 1, (1972).

This court quoted in the above case from ***Ex Parte Levitt,*** **302 U.S. 633, 634, (1937) at 408 U.S. 13,**

> ". . . established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action. . . ."

and, same page,

> "The respondents do not meet this test."

Like the respondents in *Laird v. Tatum,* Supra, Appellee herein disagrees with the requirement because they do not want the substantive information revealed by the investigation to be learned. Once the investigation is made and the information is available it will then be considered in its actual context; not in the terms of the ordinance language.

This, then, would be the evidence the applicant would have to refute and there is nothing vague about the actual evidence. How the Police Chief was instructed to obtain it, by vague language or otherwise is not a judicial question. *Laird v. Tatum,* Supra.

Appellee therefore had no standing to question the manner of the Council's instruction to the Chief of Police as to how to perform his duties as a license may be and actually was issued without the consent or approval of the Chief of Police. *The City of Mesquite v. Aladdin's Castle,* Supra.

City concedes that if Appellee had alleged violation of the right of privacy in the trial court, its standing would have been enhanced though still foreclosed by *Laird v. Tatum,* but where no such right is alleged and the only complaint is vagueness, its claim of standing is frivolous.

VAGUENESS

The same misinterpretation of the ordinance pointed out under the question of standing applies equally to this question. If the term, "connections with criminal elements" was set up as a standard for which the council and the State courts must judge an applicant's right to a license it must at least be precise enough so that those charged with the responsibility of review would know what standards to apply. But such is not the case. Review, as heretofore demonstrated, is upon the standard of good character as a law abiding citizen. In the context in which it is used it adequately informs the Chief of Police as to what his duties are.

But even were the term established as a standard for determining the eligibility of an applicant for a license, which it is not, it is not unconstitutionally vague as a business regulation. *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, (1952).

The court below erroneously relied upon cases construing criminal statutes, some of which touched upon First Amendment rights of speech. *Smith v. Goguen,* 415 U.S. 566, (1974) relied upon by the court below, states, 415 U.S. at 573,

> "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."

This court stated in *Papachristou v. City of Jacksonville,* Supra, 405 U.S. 156 at 162,

> "In the field of regulatory statutes governing business activities, where the acts are in a narrow category, greater leeway is allowed."

In *Grayned v. City of Rockford*, 408 U.S. 104, (1972) this court upheld a criminal statute because of its requirement that the noise be actually incompatible with normal school activity.

The instant ordinance requires that the relationship be incompatible with the protection of those of tender years (J.A. 86-7).

> ". . . . to the extent that the fencing of stolen merchandise of illegally obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely."

The court below was of the opinion that an individual would be unable to measure this "extent". Again, this court stated in *Grayned v. City of Rockford*, Supra, 408 U.S. at 112,

> "Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's *announced purpose* that the measure is whether normal school activity has been or is about to be disrupted."

When one examines the Section of the ordinance designated "Legislative Policy" (J.A. 87-8) it will readily be noted that the announced purpose of the ordinance limits and clarifies the language as in *Grayned*, Supra.

Therefore, the cases relied upon by the court below are inapplicable to the instant case and the provision should be upheld as a legitimate direction to the Chief of Police and as legitimate legislative policy.

CONCLUSION

For the reasons shown herein, the judgment of the court below should be reversed. In the alternative, should it be determined that the "strict scrutiny" test is applicable, the case should in the interest of justice be remanded to the trial court for a more complete development of the facts under the more stringent test.

Respectfully Submitted,

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